**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

M. EDWARD CUNNINGHAM, II,
Individually and as Next Friend and Father
of R.E.C., a minor,

Plaintiff,

v. CIVIL ACTION NO. 3:17-cv-02521

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the Plaintiff, M. Edward Cunningham, II, Individually and as the Next Friend and Father of R.E.C., a minor, by counsel, Bert Ketchum and Greene, Ketchum, Farrell, Bailey & Tweel, LLP, and for his Complaint against the United States of America states, as follows:

PARTIES

1. Plaintiff, M. Edward Cunningham, II, is a resident of Wayne County, West Virginia and the father of R.E.C., a minor.

2. Plaintiff, R.E.C., a minor, was born on May 10, 2004 and brings this action through his father, M. Edward Cunningham, II, with whom he lives pursuant to Federal Rules of Civil Procedure 17(b)(3) and West Virginia Rules of Civil Procedure 17(c)

3. Defendant, the United States of America (hereinafter called “the United States”), is the United States Government and subject to the Federal Torts Claims Act 28 USC §1346. Pursuant to the provisions of the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671-2680, and other applicable federal law, the sole and proper defendant in this civil action is

the United States of America, and the FTCA requires that the United States of America be substituted as the sole and proper defendant in place of Valley Health Systems, Inc. and Dr. Kara Smith.

JURISDICTION

4. The claims herein are brought against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, and 28 U.S.C. § 1346(b)(1).

5. This Court has original jurisdiction of this civil action under the provisions of 28 U.S.C. § 1346(b)(1).

6. This Court has supplemental jurisdiction over related claims and parties pursuant to 28 U.S.C. 1367, *et seq.*

7. Pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2675(a), Plaintiff, by counsel, filed a verified administrative claim on December 8, 2016, with the U.S. Department of Health and Human Services Administration and requested a sum certain in the amount of $150,000.00 (one hundred fifty thousand dollars and no cents) (Exhibit 1 Attached). Plaintiff filed supporting information and documentation with the administrative claim.

8. Plaintiff's administrative claim was received by the U.S. Department of Health and Human Services Administration on about December 8, 2016. In a letter dated December 12, 2016, the U.S. Department of Health and Human Services acknowledged receipt of Plaintiff's administrative claim. (Exhibit 2 Attached)

9. The U.S. Department of Health and Human Services Administration never responded to the administrative claim. Therefore, Plaintiff has exhausted all administrative remedies.

VENUE

10. Venue is proper as all acts or omissions complained of herein occurred in the Southern District of West Virginia.

FACTUAL BACKGROUND

11. Plaintiff reasserts paragraphs numbered 1-10 of the Complaint as if stated verbatim herein.

12. On December 12, 2014, R.E.C., a minor, presented to Valley Health Systems, Inc. with complaints of his tooth being very painful and keeping him up at night. There was swelling in his face and neck. Dr. Kara Smith treated R.E.C. when he presented to Valley Health Systems, Inc. by ordering an x-ray. Thereafter, Dr. Smith advised R.E.C. and his father, M. Edward Cunningham, II, tooth #K, a nonpermanent tooth, was causing R.E.C.'s problem and could either be extracted or allowed to fall out naturally sometime within the next two to three months. With the consent of R.E.C.'s father, Dr. Smith extracted tooth #K. The following day R.E.C. had more swelling and by December 14, 2014, his pain and swelling had intensified. R.E.C. was taken to Med Express on December 14, 2014, who advised his parents they needed to see a dentist. R.E.C.'s mother called Valley Health Systems, Inc. that same day and talked to Dr. Daniel Brody. Dr. Brody reviewed the December 12, 2014 x-rays taken at Valley Health Systems, was confident the #19 tooth had PARL and was the cause of the pain. Dr. Brody called in prescriptions and advised Mrs. Cunningham to see his regular dentist in the morning. On the morning of December 15, 2014, Dr. Nancy Mussetter examined R.E.C., advised that R.E.C. had a severe infection and sent R.E.C. immediately to the emergency room. R.E.C. was admitted to Cabell Huntington Hospital on December 15, 2014 and

underwent multiple exams as well as being taken to the operating room for I&D. R.E.C. was discharged from CHH on December 22, 2014.

13. This medical professional liability action arises out of the medical care and treatment rendered to R.E.C. by Defendant, the United States, its agents, servants and employees on or about December 12, 2014 and thereafter.

14. The United States employs executives, administrators, physicians, nurses, personnel, employees, and/or other health care professionals and agents, and held them out and warranted them to the public to be competent, careful and experienced in the care and treatment of patients and in the oversight of staff of said hospital.

15. Plaintiff fully complied with the pre-suit notification requirements found at W.Va.Code § 55-7B-6 and the Defendant did not respond to the administrative claim or elect mediation. A copy of said Screening Certificate of Merit is attached to Exhibit "1" and made part of this Complaint as if fully set forth herein.

16. Certain claims asserted by the Plaintiff may fall within the Medical Professional Liability Act's cap on non-economic damages and Plaintiff reserves the right to challenge the constitutionality of the same.

COUNT I

17. Plaintiffs reassert paragraphs numbered 1-16 of this Complaint as if fully stated verbatim herein.

18. At all times relevant to this civil action, the United States, its agents, servants and employees, had duties:

(a) to use reasonable care in providing medical care to their patients;

(b) to select and retain only competent agents and employees;

(c) to oversee all persons who provide medical care within the walls of their facility as to patient care;

(d) to formulate, adopt and enforce adequate rules, policies and procedures to ensure quality care for their patients; and

(e) to provide a safe environment for patients.

19. Moreover, the United States, its agents, servants and employee, breached their duties to R.E.C., by failing to formulate, adopt, enforce and apply adequate rules, policies and procedures to ensure R.E.C. safety and care during the course of his treatment and care.

20. As a direct and proximate result of the negligence and deviation of the standard of care by the United States, its agents, servants and employees, R.E.C. sustained personal injuries and damages; sustained permanent injuries; incurred and will incur in the future hospital and medical bills and expenses; incurred and will incur in the future loss of enjoyment of life; sustained and will sustain in the future pain of the body and mind; and was otherwise seriously and permanently injured.

21. As a direct and proximate result of the negligence and deviation of the standard of care by the United States, its agents, servants and employees, M. Edward Cunningham, II, has incurred the responsibility for paying minor, R.E.C.'s, hospital and medical bills and expenses and will incur the responsibility of paying minor, R.E.C.'s, hospital and medical bills and expenses in the future.

WHEREFORE, Plaintiff, M. Edward Cunningham, II, Individually and as Next Friend and Father of R.E.C., a minor, demands judgment against the United States in an amount that will reasonably compensate them for their injuries, damages, expenses, attorney fees, court costs, plus prejudgment interest and interest on any verdict rendered herein.

COUNT II

22. Plaintiff reasserts paragraphs 1-21 of the Complaint as if stated verbatim herein.

23. Plaintiff is proceeding on a "loss of chance" theory.

24. Defendant, the United States, acting by and through its agents, servants and employees, failed to follow the accepted standard of care which deprived R.E.C. of a chance of recovery or increased the risk of harm to R.E.C. which was a substantial factor in bringing about the ultimate injury to R.E.C., a minor.

25. Following the accepted standard of care to a reasonable degree of medical probability would have resulted in a greater than twenty-five percent chance that R.E.C. would have had an improved recovery.

26. As a direct and proximate result of the negligence and deviation of the standard of care by the United States, its agents, servants and employees, R.E.C. sustained personal injuries and damages; sustained permanent injuries; incurred and will incur in the future hospital and medical bills and expenses; incurred and will incur in the future loss of enjoyment of life; sustained and will sustain in the future pain of the body and mind; and was otherwise seriously and permanently injured.

27. As a direct and proximate result of the negligence and deviation of the standard of care by the United States, its agents, servants and employees, M. Edward Cunningham, II, has incurred the responsibility for paying minor, R.E.C.'s, hospital and medical bills and expenses and will incur the responsibility of paying minor, R.E.C.'s, hospital and medical bills and expenses in the future.

WHEREFORE, Plaintiff, M. Edward Cunningham, II, Individually and as Next Friend and Father of R.E.C., a minor, demands judgment against the United States in an amount that will reasonably compensate them for their injuries, damages, expenses, attorney fees, court costs, plus prejudgment interest and interest on any verdict rendered herein.

M. EDWARD CUNNINGHAM, II,
Individually and as Next Friend and Father
of R.E.C., a minor,

/s/ Bert Ketchum
____

Bert Ketchum (WVSB #6618)
GREENE, KETCHUM, BAILEY
WALKER, FARRELL & TWEEL, LLP
419 Eleventh Street
Post Office Box 2389
Huntington, WV 25724
(304) 525-9115